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Supreme Court, U.S.
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IN THE SUPREME COURT
OF THE UNITED STATES

Willie R. Brown,
Petitioner,

v.

Scott Fisher, J.J. Webber,
and County of Miami, Kansas,
Respondents.

ON APPEAL FROM DECISION OF THE TENTH CIRCUIT COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

by Willie R. Brown
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Questions on Appeal

1. Did the arresting officer's probable cause evaporate?

2. Did the Tenth Circuit Court of Appeals err in failing to consider that probable cause for an arrest originates in the Kansas Statutes?

3. Did the Tenth Circuit Court of Appeals err in affirming a motion for summary judgment in favor of the arresting officer, Miami County (Kansas) Deputy Scott Fisher?

4. Did the Tenth Circuit Court of Appeals err in dismissing Miami County, KS as a party to this case?

5. Is it a miscarriage of justice that the Tenth Circuit Court of Appeals can self-proclaim itself to be a mere rubber-stamper for anything the police do?

6. Does the Tenth Circuit Court of Appeals suffer for the presumption that government agents always act correctly, the assumption Willie Brown is guilty until proven innocent, and the presumption that including infractions in the general category of crimes makes them equally arrestable?

7. Did the Tenth Circuit Court of Appeals, relying upon U.S. Supreme Court decisions, effectively abolish the federal 4th Amendment?

8. Is there no qualified immunity?

PARTIES TO THIS CASE

are given in the caption to this case, in conformance to S.Ct. Rule 14.1(b). There are no corporate structure or stock holdings to disclose, and this statement conforms to S.Ct. Rule 29.6.

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CITATIONS OF OFFICIAL AND UNOFFICIAL REPORTERS

Brown v. Fisher, not reported in F.Supp.2d, 2006WL470580, D.Kan., Feb. 27, 2006 (No. Civ. A. 05-2268-KHV) ...Only the WestLaw citation is currently available.

Brown v. Fisher, WestLaw 3011051 (not selected for publication in the federal reports), CA 10 (Kan.), October 16, 2007 (N0. 06-3207)

JURISDICTION

(A) The date the original judgment of the Tenth Circuit Court of Appeals was entered is October 16, 2007.

(B) The date an order was given regarding a Petition for Panel Rehearing is January 2, 2008.

(C) The statutory provision that confers the Supreme Court with jurisdiction to review a writ of certiorari is 42 U.S.C. §1983, 28 U.S.C. §1381 and §1383.

THE LAW AT ISSUE

KANSAS CODE OF CRIMINAL PROCEDURE
Kansas Statutes Annotated (K.S.A.):

22-2401. Arrest by law enforcement officer. A law enforcement officer may arrest a person under any of the following circumstances:

(a) The officer has a warrant commanding that the person be arrested.

(b) The officer has probable cause to believe that a warrant for the person's arrest has been issued in this state or in another jurisdiction for a felony committed therein.

(c) The officer has probable cause to believe that the person is committing or has committed:

(1) A felony; or

(2) a misdemeanor, and the law enforcement officer has probable cause to believe that:

(A) The person will not be apprehended or evidence of the crime will be irretrievably lost unless the person is immediately arrested;

(B) the person may cause injury to self or others or damage to property unless immediately arrested; or

(C) the person has intentionally inflicted bodily harm to another person.

(d) Any crime, except a traffic infraction or a cigarette or tobacco infraction, has been or is being committed by the person in the officer's view.

History: L. 1970, ch. 129, § 22-2401; L. 1984, ch. 127, § 2; L. 1984, ch. 39, § 37; L. 1996, ch. 214, § 29; July 1.

Chapter 8.--AUTOMOBILES AND OTHER VEHICLES
Article 21.--UNIFORM ACT REGULATING TRAFFIC; PARTIES, ARRESTS, CITATIONS, PROCEDURES AND PENALTIES

K.S.A. 8-2118. Uniform fine schedule for traffic infraction violations; payment by mail with plea, when; full payment required; ordinance traffic infractions; doubling of fine in road construction zone and school zone. (a) A person charged with a traffic infraction shall, except as provided in subsection (b), appear at the place and time specified in the notice to appear. If the person enters an appearance, waives right to trial, pleads guilty or no contest, the fine shall be no greater than that specified in the uniform fine schedule in subsection (c) and court costs shall be taxed as provided by law.

(b) Prior to the time specified in the notice to appear, a person charged with a traffic infraction may enter a written appearance, waive right to trial, plead guilty or no contest and pay the fine for the violation as specified in the uniform fine schedule in subsection (c) and court costs provided by law. Payment may be made by mail or in person and may be by personal check. The traffic citation shall not have been complied with if a check is not honored for any reason, or if the fine and court costs are not paid in full. When a person charged with a traffic infraction makes payment without executing a written waiver of right to trial and plea of guilty or no contest, the payment shall be deemed such an appearance, waiver of right to trial and plea of no contest.

(c) The following uniform fine schedule shall apply uniformly throughout the state but shall not limit the fine which may be imposed following a court appearance, except an appearance made for the purpose of pleading and payment as permitted by subsection (a). The description of offense contained in the following uniform fine schedule is for reference only and is not a legal definition.

Description of Offense	Statute	Fine
Refusal to submit to a preliminary breath test	8-1012	$90
Unsafe speed for prevailing conditions	8-1557	$60
Exceeding maximum speed limit; or speeding in zone posted by the state department of transportation; or speeding in locally posted zone	8-1558 to 8-1560	
8-1560a or 8-1560b 1-10 mph over the limit,		$30
11-20 mph over the limit, $30 plus $6 per mph over 10 mph over the limit;		
21-30 mph over the limit, $90 plus $9 per mph over 20 mph over the limit;		
31 and more mph over the limit, $180 plus $15 per mph over 30 mph over the limit;		
Disobeying traffic control device	8-1507	$60
Violating traffic control signal	8-1508	$60
Violating pedestrian control signal	8-1509	$30
Violating flashing traffic signals	8-1510	$60
Violating lane-control signal	8-1511	$60
Unauthorized sign, signal, marking or device	8-1512	$30
Driving on left side of roadway	8-1514	$60
Failure to keep right to pass oncoming vehicle	8-1515	$60
Improper passing; increasing speed when passed	8-1516	$60
Improper passing on right	8-1517	$60

Passing on left with insufficient clearance	8-1518	$60
Driving on left side where curve, grade, intersection railroad crossing, or obstructed view	8-1519	$60
Driving on left in no-passing zone	8-1520	$60
Unlawful passing of stopped emergency vehicle	8-1520a	$60
Driving wrong direction on one-way road	8-1521	$60
Improper driving on laned roadway	8-1522	$60
Following too close	8-1523	$60
Improper crossover on divided highway	8-1524	$30
Failure to yield right-of-way at uncontrolled Intersection	8-1526	$60
Failure to yield to approaching vehicle when turning left	8-1527	$60
Failure to yield at stop or yield sign	8-1528	$60
Failure to yield from private road or driveway	8-1529	$60
Failure to yield to emergency vehicle	8-1530	$180
Failure to yield to pedestrian or vehicle working on roadway	8-1531	$90
Failure to comply with restrictions in road construction zone	8-1531a	$30
Disobeying pedestrian traffic control device	8-1532	$30
Failure to yield to pedestrian in crosswalk; pedestrian suddenly entering roadway; passing vehicle stopped for pedestrian at crosswalk	8-1533	$60
Improper pedestrian crossing	8-1534	$30
Failure to exercise due care in regard to pedestrian	8-1535	$30
Improper pedestrian movement in crosswalk	8-1536	$30
Improper use of roadway by pedestrian	8-1537	$30

Soliciting ride or business on roadway	8-1538	$30
Driving through safety zone	8-1539	$30
Failure to yield to pedestrian on sidewalk	8-1540	$30
Failure of pedestrian to yield to emergency vehicle	8-1541	$30
Failure to yield to blind pedestrian	8-1542	$30
Pedestrian disobeying bridge or railroad signal	8-1544	$30
Improper turn or approach	8-1545	$60
Improper "U" turn	8-1546	$60
Unsafe starting of stopped vehicle	8-1547	$30
Unsafe turning or stopping, failure to give proper signal; using turn signal unlawfully	8-1548	$60
Improper method of giving notice of intention to turn	8-1549	$30
Improper hand signal	8-1550	$30
Failure to stop or obey railroad crossing signal	8-1551	$180
Failure to stop at railroad crossing stop sign	8-1552	$120
Certain hazardous vehicles failure to stop at railroad crossing	8-1553	$180
Improper moving of heavy equipment at railroad crossing	8-1554	$60
Vehicle emerging from alley, private roadway, building or driveway	8-1555	$60
Improper passing of school bus; improper use of school bus signals	8-1556	$300
Improper passing of church or day-care bus; improper use of signals	8-1556a	$180
Impeding normal traffic by slow speed	8-1561	$30
Speeding on motor-driven cycle	8-1562	$60
Speeding in certain vehicles or on posted bridge	8-1563	$30

Improper stopping, standing or parking on roadway	8-1569	$30
Parking, standing or stopping in prohibited area	8-1571	$30
Improper parking	8-1572	$30
Unattended vehicle	8-1573	$30
Improper backing	8-1574	$30
Driving on sidewalk	8-1575	$30
Driving with view or driving mechanism obstructed	8-1576	$30
Unsafe opening of vehicle door	8-1577	$30
Riding in house trailer	8-1578	$30
Improper driving in defiles, canyons, or on grades	8-1579	$30
Coasting	8-1580	$30
Following fire apparatus too closely	8-1581	$60
Driving over fire hose	8-1582	$30
Putting glass, etc., on highway	8-1583	$90
Driving into intersection, crosswalk, or crossing without sufficient space on other side	8-1584	$30
Improper operation of snowmobile on highway	8-1585	$30
Parental responsibility of child riding bicycle	8-1586	$30
Not riding on bicycle seat; too many persons on bicycle	8-1588	$30
Clinging to other vehicle	8-1589	$30
Improper riding of bicycle on roadway	8-1590	$30
Carrying articles on bicycle; one hand on handlebars	8-1591	$30
Improper bicycle lamps, brakes or reflectors	8-1592	$30
Improper operation of motorcycle; seats; passengers, bundles	8-1594	$30

Improper operation of motorcycle on laned roadway	8-1595	$60
Motorcycle clinging to other vehicle	8-1596	$30
Improper motorcycle handlebars or passenger equipment	8-1597	$60
Motorcycle helmet and eye-protection requirements	8-1598	$30
Unlawful riding on vehicle	8-1578a	$60
Unlawful operation of all-terrain vehicle	8-15,100	$60
Unlawful operation of low-speed vehicle	8-15,101	$60
Littering	8-15,102	$100
Disobeying school crossing guard	8-15,103	$60
Unlawful operation of work-site utility vehicle	8-15,105	$60
Equipment offenses that are not misdemeanors	8-1701	$60
Driving without lights when needed	8-1703	$30
Defective headlamps	8-1705	$30
Defective tail lamps	8-1706	$30
Defective reflector	8-1707	$30
Improper stop lamp or turn signal	8-1708	$30
Improper lighting equipment on certain vehicles	8-1710	$30
Improper lamp color on certain vehicles	8-1711	$30
Improper mounting of reflectors and lamps on certain vehicles	8-1712	$30
Improper visibility of reflectors and lamps on certain vehicles	8-1713	$30
No lamp or flag on projecting load	8-1715	$60
Improper lamps on parked vehicle	8-1716	$30
Improper lights, lamps, reflectors and emblems on farm tractors or slow-moving vehicles	8-1717	$30

Improper lamps and equipment on implements of husbandry, road machinery or animal-drawn vehicles	8-1718	$30
Unlawful use of spot, fog, or auxiliary lamp	8-1719	$30
Improper lamps or lights on emergency vehicle	8-1720	$30
Improper stop or turn signal	8-1721	$30
Improper vehicular hazard warning lamp	8-1722	$30
Unauthorized additional lighting equipment	8-1723	$30
Improper multiple-beam lights	8-1724	$30
Failure to dim headlights	8-1725	$60
Improper single-beam headlights	8-1726	$30
Improper speed with alternate lighting	8-1727	$30
Improper number of driving lamps	8-1728	$30
Unauthorized lights and signals	8-1729	$30
Improper school bus lighting equipment and warning devices	8-1730	$30
Unauthorized lights and devices on church or day-care bus	8-1730a	$30
Improper lights on highway construction or maintenance vehicles	8-1731	$30
Defective brakes	8-1734	$30
Defective or improper use of horn or warning device	8-1738	$30
Defective muffler	8-1739	$30
Defective mirror	8-1740	$30
Defective wipers; obstructed windshield or windows	8-1741	$30
Improper tires	8-1742	$30
Improper flares or warning devices	8-1744	$30
Improper use of vehicular hazard warning lamps and devices	8-1745	$30

Improper air-conditioning equipment 8-1747 $30
Improper safety belt or shoulder harness 8-1749 $30
Improper wide-based single tires 8-1742b $60
Improper compression release engine braking system 8-1761 $60
Defective motorcycle headlamp 8-1801 $30
Defective motorcycle tail lamp 8-1802 $30
Defective motorcycle reflector 8-1803 $30
Defective motorcycle stop lamps and turn signals 8-1804 $30
Defective multiple-beam lighting 8-1805 $30
Improper road-lighting equipment on motor-driven cycles 8-1806 $30
Defective motorcycle or motor-driven cycle brakes 8-1807 $30
Improper performance ability of brakes 8-1808 $30
Operating motorcycle with disapproved braking system 8-1809 $30
Defective horn, muffler, mirrors or tires 8-1810 $30
Unlawful statehouse parking 75-4510a $15
Exceeding gross weight of vehicle or combination 8-1909

Pounds Overweight
up to 1000.....$25
1001 to 2000.....3¢ per pound
2001 to 5000.....5¢ per pound
5001 to 7500.....7¢ per pound
7501 and over.....10¢ per pound

Exceeding gross weight on any axle or tandem, triple or quad axles 8-1908

Pounds Overweight
up to 1000.....$25
1001 to 2000.....3¢ per pound
2001 to 5000.....5¢ per pound
5001 to 7500.....7¢ per pound

7501 and over.....10¢ per pound

Failure to obtain proper registration, clearance or to have current certification	66-1324	$272
Insufficient liability insurance for motor carriers	66-1,128 or 66-1314	$122
Failure to obtain interstate motor fuel tax authorization	79-34,122	$122
No authority as private or common carrier	66-1,111	$122
Violation of motor carrier safety rules and regulations, except for violations specified in subsection (b)(2) of K.S.A. 66-1,130, and amendments thereto	66-1,129	$100

(d) Traffic offenses classified as traffic infractions by this section shall be classified as ordinance traffic infractions by those cities adopting ordinances prohibiting the same offenses. A schedule of fines for all ordinance traffic infractions shall be established by the municipal judge in the manner prescribed by K.S.A. 12-4305, and amendments thereto. Such fines may vary from those contained in the uniform fine schedule contained in subsection (c).

(e) Fines listed in the uniform fine schedule contained in subsection (c) shall be doubled if a person is convicted of a traffic infraction, which is defined as a moving violation in accordance with rules and regulations adopted pursuant to K.S.A. 8-249, and amendments thereto, committed within any road construction zone as defined in K.S.A. 8-1458a, and amendments thereto.

(f) For a second violation of K.S.A. 8-1908 or 8-1909, and amendments thereto, within two years after a prior conviction of K.S.A. 8-1908 or 8-1909, and amendments thereto, such person, upon conviction shall be fined 1 1/2 times the applicable

amount from one, but not both, of the schedules listed in the uniform fine schedule contained in subsection (c). For a third violation of K.S.A. 8-1908 or 8-1909, and amendments thereto, within two years, after two prior convictions of K.S.A. 8-1908 or 8-1909, and amendments thereto, such person, upon conviction shall be fined two times the applicable amount from one, but not both, of the schedules listed in the uniform fine schedule contained in subsection (c). For a fourth and each succeeding violation of K.S.A. 8-1908 or 8-1909, and amendments thereto, within two years after three prior convictions of K.S.A. 8-1908 or 8-1909, and amendments thereto, such person, upon conviction shall be fined 2 1/2 times the applicable amount from one, but not both, of the schedules listed in the uniform fine schedule contained in subsection (c).

(g) Fines listed in the uniform fine schedule contained in subsection (c) relating to exceeding the maximum speed limit, shall be doubled if a person is convicted of exceeding the maximum speed limit in a school zone authorized under subsection (a)(4) of K.S.A. 8-1560, and amendments thereto.

Chapter 8.--AUTOMOBILES AND OTHER VEHICLES
Article 17.--UNIFORM ACT REGULATING TRAFFIC; EQUIPMENT OF VEHICLES

8-1701. Scope and effect of sections in article 17; unlawful acts. (a) It is unlawful for any person to drive or move or for the owner to cause or knowingly permit to be driven or moved on any highway any vehicle or combination of vehicles which does not contain those parts or is not at all times equipped

with such lamps and other equipment in proper condition and adjustment as required in this article, or which is equipped in any manner in violation of any provision of any section of this article 17, or for any person to do any act forbidden or fail to perform any act required by any provision of any section of this article 17. Except as otherwise provided in K.S.A. 8-1742a, 8-1743, 8-1746 and 8-1750 to 8-1760, inclusive, and amendments thereto, any violation of this subsection (a) or of any other provision of this article 17 is a traffic infraction.

(b) Nothing contained in this article 17 shall be construed to prohibit the use of additional parts and accessories on any vehicle not inconsistent with the provisions of this article.

(c) The provisions of this article 17 with respect to equipment required on vehicles shall not apply to implements of husbandry, road machinery, road rollers or farm tractors except as specifically made applicable in this act.

(d) The provisions of this article 17 with respect to equipment required on vehicles shall not apply to motorcycles or motor-driven cycles, except as specifically made applicable by law.

(e) A low-speed vehicle which is in compliance with the equipment requirements in 49 C.F.R. 571.500 shall be deemed to be in compliance with the provisions of this article 17.

History: L. 1974, ch. 33, § 8-1701; L. 1984, ch. 39, § 14; L. 2000, ch. 179, § 22; July 1.

Chapter 8.--AUTOMOBILES AND OTHER VEHICLES
Article 17.--UNIFORM ACT REGULATING TRAFFIC; EQUIPMENT OF VEHICLES

8-1703. When lighted lamps required. (a) Every vehicle, except as provided in subsection (b), upon a highway within this state, at all times shall display lighted head and other lamps and illuminating devices as required for different classes of vehicles, subject to exceptions with respect to parked vehicles:

(1) From sunset to sunrise;

(2) when due to insufficient light or unfavorable atmospheric conditions, including smoke or fog, persons and vehicles on the highway are not clearly discernible at a distance of 1,000 feet ahead; or

(3) when windshield wipers are in continuous use as a result of rain, sleet or snow.

Stop lights, turn signals and other signaling devices shall be lighted as prescribed for the use of such devices.

(b) Motorcycles, motor-driven cycles and motorized bicycles manufactured after January 1, 1978, shall display lighted head and tail lights at all times that such vehicles are operated on any highway.

(c) Law enforcement officers shall issue a warning citation to anyone violating subsection (a)(3).

History: L. 1974, ch. 33, § 8-1703; L. 1982, ch. 45, § 1; L. 1990, ch. 49, § 1; L. 2006, ch. 182, § 3; July 1.

K.S.A. 21-3102. Scope and Application. (1) No conduct constitutes a crime against the state of Kansas unless it is made criminal in this code or in another statute of this state, but where a crime is denounced by any statute of this state, but not defined, the definition of such crime at common law shall be applied.

(2) Unless expressly stated otherwise, or the context otherwise requires, the provisions of this code apply to crimes created by statute other than in this code.
(3) This code does not affect the power of a court to punish for contempt or to employ any sanction authorized by law for the enforcement of an order or a civil judgment or decree.
(4) This code has no application to crimes committed prior to its effective date. A crime is committed prior to the effective date of the code if any of the essential elements of the crime as then defined occurred before that date. Prosecutions for prior crimes shall be governed, prosecuted and punished under the laws existing at the time such crimes were committed.
History: L. 1969, ch. 180, §21-3102; July 1, 1970.

Kansas Constitution Bill of Rights § 15. Search and Seizure. The right of the people to be secure in their persons and property against unreasonable searches and seizures shall be inviolate; and no warrant shall issue but on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons or property to be seized.

Amendment 4 - Search and Seizure. Ratified 12/15/1791.
The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF FACTS

Petitioner Willie Brown was driving north on the highway toward Paola, Kansas after sunset. A county deputy on traffic patrol, Scott Fisher, noticed one of Mr. Brown's headlights was out and stopped him. Mr. Brown is very leery of patrolmen and very knowledgeable of 4th Amendment issues, so he repeatedly questioned the deputy as to his "probable cause." The deputy became irritated and demanded Brown's driver's license. Brown got out of the pickup to look for his attache case from behind the seat and the deputy ordered him back in. The deputy eventually halted Brown in his search for the license, handcuffed Brown and put him in the back seat of the patrol car, where a woman in a pretty dress was occupying the front seat. She never looked at or talked to Brown. That still remains suspicious.

Miami County Deputy Scott Fisher himself resumed the search for Brown's driver's license and found it, called it in to dispatch, and confirmed its validity, thereby proving Brown was innocent of any driver license violation. A nearby Kansas State Trooper, J.J. Webber, drove in to assist. The two officers consulted, then deputy Fisher took Brown to the Miami County Jail to book him on a failure to display a valid driver's license. Brown was kept overnight and released in the morning when the Sheriff decided there was no probable cause to hold Brown. No charges were filed.

Back at the scene of the arrest, Trooper J.J. Webber was left alone, then decided to investigate the pickup

on his own. He found an aluminum can behind the pickup seat, drove to the jail to hand it over to deputy Fisher, and the two of them charged Brown with violation of state law for having an open container.

The aluminum can was old and dry. It was labeled as Milwaukee's Best NA, "No alcohol."

STATEMENT OF ORIGINAL JURISDICTION

This case was first tried in the United States District Court (Kansas) as 05-2268-KHV-GLB pursuant to federal statute 42 U.S. Code §1983.

ARGUMENT

1. Did the arresting officer's probable cause evaporate?

Delaware v. Prouse, 440 U.S. 648 (1979), found that arbitrarily stopping a driver to check his license and car registration is unreasonable under the Fourth Amendment. A Police officer must have reasonable suspicion the driver is not license, the car not registered, or the vehicle or an occupant is other subject to seizure for a violation of law.

The deputy's original cause for action (probable cause) was a non-arrestable traffic infraction, a headlight out, per Kansas statutes. He did nothing with that cause of action, so it must be deemed abandoned. There were no tickets, no

citations, no charges, no prosecution, no trial, no records, no transcripts, no appeals. It's not a bookable offense.

When the production of a driver's license took too long (a subjective decision of the arresting officer), Willie Brown was arrested and the arresting officer finished the search for what ultimately resulted in a valid driver's license. Since there is no evidence of failure to provide the license and no evidence of refusal to provide the license, this was a false arrest under K.S.A. 8-244 (failure to display a driver's license). Once the officer, who had already confined Brown to his patrol car in handcuffs, proved that Brown was innocent, probable cause evaporated.

There are no statements anywhere in this instant appeal (at arrest, at the federal district court level, or on appeal) that the arresting officer suspected the operator had no driver's license when he pulled Brown over.

Probable cause cannot be applied retroactively.

Conclusion: Miami County Deputy Scott Fisher had absolutely no probable cause to arrest Willie Brown.

2. Did the Tenth Circuit Court of Appeals err in failing to consider that probable cause for an arrest originates in the Kansas Statutes?

The Kansas legislature explicitly decrees that headlights out (and specific other equipment defects)

are explicitly captioned as infractions only and are not arrestable in and of themselves.

The opposing lawyers admit this.

At the Tenth Circuit Court of Appeals level, during a mandated reply to Willie Brown's Motion for a Panel Rehearing, the defensive counsel admitted the statements above as their point 1. Their point 2 was an astounding distortion of federal principles to wit:

> "The Fourth Amendment requires only that a warrantless arrest be reasonable. It does not require specific state statutory authorization for the arrest. Thus, regardless of whether K.S.A. 2006 Supp. 22-2401(d) authorizes Brown's arrest, the issue remains whether the arrest was reasonable under the Fourth Amendment. Because Brown's arrest was based on probable cause, it was reasonable and does not provide a basis for Brown's Section 1983 claim."

The defense's assertion contains tremendous leaps of logic. It points out correctly that the Fourth Amendment itself contains no requirements that arrests be made according or conforming to various state statutes. The defensive counsels thereby rejected all statutes in their logic and declared the Fourth Amendment elements had to stand on their own, which is that unreasonable is overcome by reason. A reason. Some reason. Some kind of reason.

Defensive counsel then interjects this pie-in-the-sky rationale: "Because Brown's arrest was based upon probable cause, it was reasonable...."

The lawyers for the officers' summary judgments at the federal district court level argued Mr. Brown had either refused or failed to provide a valid driver's license, and such an event is arrestable by state law. However, the Tenth Circuit could find no evidence and no statement from Mr. Brown that he had either refused or demonstrated failure. As a result, the Tenth Circuit rejected the argument and turned its attention to the traffic infraction. It determined that while the driver's license statute was not violated and did not support the arrest, such an arrest could have been made upon the same set of circumstances that supported the probable cause the deputy originally suspected.

However, it is a glaring error upon the Tenth Circuit justices that none of them ever read the Kansas statutes, for if they had they would have found that Kansas legislature explicitly decrees that headlights out (and specific other equipment defects) are explicitly captioned as infractions only and are not arrestable in and of themselves.

Where does that probable cause then come from? (*See* Issue #1 above; it evaporated.) Not from the common law. Not from federal common law. Not from state common law. It can only come from the state legislated statutes. Since 1969, all common law crimes in Kansas have been abolished (K.S.A. 21-3102), and there is no probable cause to believe a

crime has been committed, is being committed, is about to be committed outside the Kansas Statutes. And these declare violations of driver's license holding to be arrestable (and that violation didn't happen) and traffic infractions are not arrestable (and that didn't happen). So by word-twisting or idea-twisting, the defensive counsels left a big gap in logic. *Wherever there is credibility gap, there is a gullibility fill.* The Tenth Circuit filled in the gap by transposing a non-ticketed traffic infraction for a non-justified license arrest.

Petitioner simply cannot support such a notion. It's intellectually dishonest.

The Tenth Circuit ultimately ruled "Though the arrest was not authorized under Kansas law, Fisher had probable cause to believe a criminal offense - albeit a very minor one - had been committed in his presence. Thus Fisher is entitled to qualified immunity on Brown's claim for unlawful arrest." Order on Petition for Rehearing, January 2, 2008, page 18.

Conclusion: This finding defies logic. These judges can't tell the difference between seizures and arrests, between infractions and misdemeanors.

3. Did the Tenth Circuit Court of Appeals err in affirming a motion for summary judgment in favor of the arresting officer, Miami County (Kansas) Deputy Scott Fisher?

The Tenth Circuit Court of Appeals recognized the cause of action by Trooper Webber (search yielding a dried up can of Miller No-Alcohol beer) was frivolous at best and unsupported as being a search incidental to an arrest because Brown had already been arrested and removed from the scene by Deputy Fisher. The federal district court of Judge Kathryn Hoefer Vratil had already declared both officers Fisher and Webber were entitled to summary judgments in their favor. The Tenth Circuit reversed the Trooper's summary judgment, but sustained the deputy's victory.

They made this preposterous finding that law enforcement officers cannot violate the Fourth Amendment relating to unreasonable searches and seizures IF they have a reason. It's a blanket statement and accepted as Truth by the Tenth Circuit.

Here's the problem: probable cause for a traffic infraction (equipment defect) does not exist outside a statute. There is no federal common law crime being investigated here. It is only Kansas's statutory provisions being enforced by a county deputy. It is apparent violations of the Kansas Constitution have occurred (Bill of Rights §15 is nearly identical to the federal 4th Amendment, both cited above) both by searches and arrest.

What is astounding about the defendants' claim that everything they arrest for is legal is the bold assertion that, without any other support, Brown's arrest was upon probable cause.

We don't find anything in the Tenth Circuit Court of Appeals decisions that the arrest was made upon probable cause. There were no tickets or citations issued for a headlight out. That's a strong indication that there was no probable cause. It does show up in Federal District Judge Kathryn Hoefer Vratil's Memorandum and Order of February 27, 2006, page 7 "Brown does not dispute that he refused to produce his driver's license, in violation of K.S.A. 8-244". Judge Vratil obviously has a different version of the Rules of Evidence that the Tenth Circuit Court of Appeals has. There was no probable cause to charge Brown with D.L. Refusal at the county level. The sheriff released Brown the next morning as he determined his own county's deputy had no probable cause to arrest this fellow who had a valid driver's license. There was no criminal case to appeal and there was no county trial. As such there is absolutely no support by the defensive counsel in this instant appeal that a crime occurred or was about to occur. Without a crime occurring, there simply is no probable cause or even reasonable suspicion present.

Yet Judge Vratil used a different standard, substituting procedure over substance. She wanted to see that Brown was rebutting any contention by the defendant officers that Brown had refused or failed to present a valid driver's license. This is because she had no objective means of validating the facts of this case. There was no trial and cross-examination of witnesses at the federal district level. Rather, it is simply the defensive counsel that posits such a claim. Even Judge Vratil does not state the deputy had probable cause.

The Tenth Circuit Court of Appeals saw through that sham. They reread the same depositions prepared for the federal district court and determined that there were no facts, no details, no conversations, no body language, and no admissions Brown had failed or refused to hand over his driver's license. Rather, the deputy himself interfered with the process of looking for it and caused any possible violation of the statute himself.

The Tenth Circuit then practiced Judge Vratil's standard of determining the validity of evidence by stating (Order on Petition for Panel Rehearing, January 2, 2008, page 13) "Brown does not dispute that he was driving with an inoperable headlight at nighttime at the time he was pulled over." Since this case is about an arrest that violates the federal Fourth Amendment, we note that headlights out are not arrestable offenses in Kansas. It's also not an arrestable offense under federal statutes. It's also not an arrestable offense under federal common law.

The county deputy had constitutional authorization to make a routine traffic stop for an equipment violation, and he may have done so (we're not sure, because probable cause does not have the foundation laid by other proof), but the arrest for a driver's license non-violation requires another instance of probable cause. In *State v. Henry*, 14 Kan. App. 416, 418, quoting *Delaware v. Prouse,* 440 U.S. 648, 663, 59 L.Ed.2d 660, 99 S.Ct. 1391 (1979), the Kansas Supreme Court held that arbitrarily stopping a driver to check his license and car registration is

unreasonable under the Fourth Amendment. A police officer must have reasonable suspicion the driver is not licensed, the car not registered, or the vehicle or an occupant is otherwise subject to seizure for a violation of the law.

So Deputy Fisher didn't have any articulated reasonable suspicion that he wondered if Brown had a driver's license. Then he dropped (abandoned) that first possible scenario to change over to mere suspicion itself that the production of a driver's license was taking too long. There's no statute against that. In other words, defendant Officer Fisher tried to apply probable cause retroactively.

Probable cause cannot be applied retroactively.

In *Wong Sun v. United States*, 371 U.S. 471 (1963), the Ninth Circuit Court of Appeals held that the arrests of both petitioners were illegal because they were not based upon "'probable cause' within the meaning of the Fourth Amendment" nor "reasonable grounds" within the meaning of the Narcotic Control Act of 1956. Here both the 4th Amendment and a federal statute are at work, as they should have been in this instant appeal.

What the defensive lawyers did at the Tenth Circuit level to confuse those judges was to substitute "warrantless arrests" for "probable cause" in their citation of the Fourth Amendment. We have found through the practice of law that lawyers misrepresent the facts, then apply federal principles to those facts,

then cite cases that have nothing at all to do with those federal principles.

Conclusion: in this instant appeal, the defensive lawyers can't even apply federal principles correctly to the Fourth Amendment, and the Tenth Circuit jumped on the same horse.

4. Did the Tenth Circuit Court of Appeals err in dismissing Miami County, KS as a party to this case?

Petitioner Brown has repeatedly shown that the County of Miami, Kansas, is responsible and liable for violations of its employees [*Monell v. Dep't of Social Services of New York City*, 436 U.S. 658 (1978)].

Defendant party Miami County objected to process of service in this federal district court case. Service of the original complaint was to be made on the county clerk or on the party's attorney. Kathy Peckman is the Miami County Clerk. She has an office in the administration building across the street and to the east of the Miami County Courthouse. The summons was served on Janet England, the Clerk of the Court in the courthouse. The lawyer for the county is David Hager. He has a pigeonhole box in the courthouse clerk's office. Janet England personally handed the summons to David Hager in the clerk's office in the courthouse that same day when he came over to pick up his mail. David Hager is authorized to accept service on behalf of Miami County. Both he and Janet England are agents of the county. David Hager was served on July 1st, 2005. Was service still effected?

K.S.A. 60-303 is the controlling statute for process of service in civil cases in Kansas: (e) *Acknowledgement or appearance.* An acknowledgement of service on the summons is equivalent to service. The voluntary appearance by a defendant is equivalent to service as of the date of appearance.

Miami County appeared through representation by defensive counsel Stephen Pigg in his August 15, 2005, Memorandum in Opposition to Motion for Summary Judgment in the Kansas District Court to contest service. This representation exists by making statements of fact on behalf of the County. What is interesting, curious, or perhaps illegal, is that Stephen Pigg is not the attorney (formally?) representing Miami County when the appeal goes into the Tenth Circuit Court of Appeals (and he files his notice of appearance on 06/14/2006 for Scott Fisher only), but when he files the Appellee's Brief it's on behalf of Fisher and Miami County.

Counsel Pigg invokes Kansas Statutes Annotated 60-304(d)(1): "Requiring service upon one of the county commissioners or the county clerk or the county treasurer in order to serve a county."

Since service is perfected by acknowledgement of the summons pursuant to Kansas Statutes Annotated 60-303(e),
was service still effected? Kansas Federal District Local Rule 4.1 states that "In case where the Federal Rules of Civil Procedure authorize service of process

in accordance with state practice it shall be the duty of the parties seeking such service to furnish to the clerk forms of all necessary orders and sufficient copies of all papers to comply with the requirements of the state practice, together with specific instructions for the making of such service." The point of law here is not whether Willie Brown submitted forms to the clerk of the federal court, it's whether the Fed. Rules Civ. P. authorized service according to state practice, and if they did, was the Tenth Circuit Court in error when it upheld the dismissal of Miami County as a defendant for improper service of a summons?

My opinion is that the Fed. R. Civ. P. don't mention state practice at all relating to service of summons and complaint. I think serving county attorney David Hager was appropriate by Rule 4(h)(1), an officer or general agent.

5. Is it a miscarriage of justice that the Tenth Circuit Court of Appeals can self-proclaim itself to be a mere rubber-stamper for anything the police do?

In its Order and Judgment of October 16, 2007, page 15, the Tenth Circuit ruled "We may affirm on any basis supported by the record." (*Felix v. Lucent Technologies Inc.*, 387 F.3d 1146, 1164 n.17 (10th Cir. 2004). These judges then looked to the record compiled by district Judge Vratil, who noted the prime cause of action was a headlight out, and the Tenth Circuit ruled that was itself an arrestable offense.

So the Tenth Circuit judges noted that there were no facts and no law to support an arrest of Willie Brown for a driver's license violation. That much is final.

Because the Tenth Circuit judges didn't read the statutes, however, they failed to notice that equipment deficiencies are traffic infractions only and not arrestable per the statutes. When this was deftly and specifically pointed out to them by Brown's Motion for a Panel Rehearing (*see Appendix*), the defense counsel admitted the statutes indeed don't allow arrest for headlights out. When the defense then gave the bogus reason that warrantless arrests made with reason conform to the Fourth Amendment, the Tenth Circuit then affirmed the lower court's decision regarding deputy Fisher "by any other basis."

Now there's a problem that originates and is caused by the Tenth Circuit Court of Appeals itself. It likes what is called "clearly established law." The Tenth Circuit itself has given us the guidelines for invoking clearly established laws.

"Ordinarily, in order for a plaintiff to demonstrate that a law is clearly established, "there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains." *Medina v. City and County of Denver*, 960 F.2d1493, 1498, (10th Cir. 1992); see also *Anderson v. Creighton*, 483 U.S. 635, 640 (1987) (a right is clearly established if the contours of the right are "sufficiently clear [so] that a reasonable official would

understand that what he is doing violates that right.")

The Tenth Circuit then gives us the clearly established law regarding evaporating probable causes: [Order and Judgment of October 16, 2007, page 15 top] "We have held [i]f police learn information that destroys their probable cause to arrest a defendant, the arrest may become illegal." *United States v. Edwards*, 242 F.3d 928, 934 (10th Cir. 2001). It exists only at the state level, and it plainly prescribes the officer's acceptable behavior. Like *State v. Rupnick*, 276 Kan. 164, 169, 72 P.3d 925 (2003) because the statutes are clear, the conclusion is *virtually inescapable*.

Then the Tenth Circuit took that clearly established law and trashed it in considering the defensive counsel's Response to Petition for Panel Rehearing of November 29th, 2007 (point 2 is that warrantless arrests made with reason don't ever violate the Fourth Amendment). The Tenth Circuit was not about to let that flimsy infraction probable cause evaporate, and ruled to affirm on any other basis.

Yes, the Tenth Circuit is mocking its own prior decisions. And yes, the Tenth Circuit appears to be going far beyond the extra mile to rubber stamp anything county deputies do.

Conclusion: the Tenth Circuit has granted a qualified immunity to anything Deputy Fisher ever has or is ever going to do, by separating qualified immunity from fact, from law, from statute, from the Fourth

Amendment. If he gets qualified immunity, every cop in America will get qualified immunity and the 4th Amendment will cease to exist overnight.

6. Does the Tenth Circuit Court of Appeals suffer for the presumption that government agents always act correctly, for the assumption that Willie Brown is guilty, and for the presumption that including infractions in the general category of crimes makes them equally arrestable?

A. There is a long-standing presumption that "Government always acts within the law and is always right." To overcome such a presumption, the opposing party has to provide proof that such a presumption is not valid.

Petitioner Brown has done that by directing your attention to the specific Kansas Statutes.

B. The presumption of innocence does not mean that the court believes Willie Brown is innocent. On the contrary, the court believes he is guilty because a warrantee has been made by a responsible party to the court that they can make the link between proof and claim to outweigh that presumption.

Until such time when the assertion is tested, Willie's presumption prevails and he is innocent. However, since the prosecution has given it's assurance, the court will assume him as being guilty even though he was presumed innocent. The court can place restrictions on him until such time when the

prosecution has opportunity to present its evidence to prove its assertion.

The prosecution's assertion is not timeless. By making the assertion it also warrants that it has all the evidence it needs and needs no more evidence to prevail over Willie's presumption. The prosecution assures the court that it is ready for trial at a place and time of the court's choosing. To prevent indefinite delays as to the trial there are statutes of limitations, time expiring points where if the assertion is not tested in a timely manner, it goes away. In that event, the presumption prevails.

If the prosecution's assertion is not tested in a timely manner, or if it fails in any way to prove its assertion, then Willie's presumption takes precedence.

The one who owns the presumption has nothing to prove.

The facts of this case are that there was no prosecution. No trial. No conviction. No warrantee by the government. No link to criminal activity for an arrest for an equipment violation and none for an invalid driver's license. Willie Brown must be presumed to be innocent all the way through this civil suit, and the assumption that he is guilty has failed.

C. Since the cause of action of traffic equipment defects only originates in Kansas statute, the Tenth Circuit erred in presuming, assuming, or being swindled by Brown's opposition that the Fourth Amendment somehow authorizes blanket use of the

police power. It doesn't. The police power originates outside the Constitution.

7. Did the Tenth Circuit Court of Appeals, relying upon its own and U.S. Supreme Court decisions, effectively abolish the federal 4th Amendment?

There is a rule celebrities have to learn: never believe your own press. Here the Tenth Circuit has violated that rule, for it loves its own clearly established law and then has counter-ruled it can affirm a prior decision by any other means. The Tenth Circuit violated its own prior holdings of *Medina v. City and County of Denver* and *United States v. Edwards*, both cited immediately above. Ignoring *Delaware v. Prouse*, cited above, it then chose U. S. Supreme Court decisions that are completely off point to make up arrestable offenses out of non-arrestable offenses. These troublesome Supreme Court cases relied upon by the Tenth Circuit are *Atwater v. City of Lago Vista*, 532 U.S. 318(2001) and United States v. Herbin, 343 F.3d 807, 810 (6th Cir. 2003) (Fourth Amendment does not prohibit custodial arrest for traffic violation even though not an arrestable offense under state law).

Atwater concludes (pages 349-350) that the Supreme Court has rejected the notion that the Fourth Amendment prohibits warrantless arrests for "fine only" offenses or traffic infractions. In *Atwater*, the arrestable offense was a seat belt violation, children not being strapped in. In *Apodaca v. City of Albequerque*, 3 F.3d 1286 (10th Cir. 2006), the

violation of speeding is a misdemeanor, and it's an arrestable offense. In Kansas, by legislative intent, infractions are not arrestable offenses.

The essential problem in using *Atwater v. City of Lago Vista* as a controlling case is that it has NOT BEEN cited correctly. The warrantless arrest of anyone violating the Texas misdemeanor statute is expressly authorized by statute, but the police may issue citations in lieu of arrest.

This cite proves the complete opposite of the defense's position that warrantless arrests outside the statutory authorizations don't violate the Fourth Amendment. *Atwater* definitely does not support that conclusion.

Apodaca never refers to traffic infractions at all. Those charges were speeding, fleeing and eluding, and reckless driving, and those are all arrestable misdemeanors.

In *Herbin*, so the opposition states, an officer can make a custodial arrest for a traffic violation even though the statute prohibits arrest. Again this is a deliberate misrepresentation of what *Herbin* resolved. Rather the 6th Circuit Court held that observation by narcotics agents of a vehicle running a red light justified stopping the vehicle, regardless of the agents' failure to issue a traffic ticket and their admitted subjective intent was to investigate for drug activity. The gist of *Herbin*, therefore, revolves around a motion to suppress evidence.

That has absolutely nothing to do with the case at bar.

Rather, *Herbin* observes: "In *Whren v. United States*, 517 U.S. 806, 812-813 (1996), the Supreme Court held that the legality of a traffic stop turns on the validity of the officer's objective explanation for making the stop, not on the subjective intentions of the officers in initiating the stop."

The Tenth Circuit then committed a huge error when it distorted the *Atwater* case in *Rucker v. Hampton*, 01-7022 (10th Cir. 2002): "Indeed, he [trooper Hampton] had probable cause to arrest Rucker for failure to keep to the right of a road in violation of Oklahoma Statute Annotated §11-301(a), which pursuant to O.S.A. §17-101(B), is a misdemeanor crime punishable by fine of up to five hundred dollars or by imprisonment for up to ten days. See *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001) holding that the Constitution tolerates full custodial arrests for fine-only offenses.)"

Mrs. Atwater's offense was a statutorily-declared arrestable misdemeanor, not a statutorily-declared unarrestable infraction, as applies in Willie Brown's case.

That celebrities believing their own press releases is a tragedy waiting to happen is demonstrated here by the Tenth Circuit Court of Appeals distorting the statutory facts of *Atwater*, citing such distortion in

Rucker, then buying its own distortion back in this instant appeal.

Understand clearly the position of petitioner Brown. He does not and has not disputed that a routine traffic stop is constitutional. He does not claim the traffic infraction itself resulted in a custodial arrest. He disputes that changing over to a subjective non-event (a valid driver's license) in order to arrest is a violation of the 4th Amendment. If the Supreme Court permits such outright and outrageous lieing to convince the Tenth Circuit to affirm the prior summary judgments by any other means, then anyone can make up anything about any case and it's all good! The Tenth Circuit apparently doesn't read case law any more than it reads statutes. If it's decision prevails, the Tenth Circuit therefore sacrifices any integrity it tried to build up over all the years.

Even though these cases are astoundingly contrary to natural rights, there is a factual defect that negates all of them. Petitioner Willie Brown is not complaining of being arrested, booked, and charged with a headlight out. That's not why he was arrested. The deputy never said Brown was under arrest for having a headlight out. He was arrested for failing to provide a valid driver's license under a separate statute. While "pretexts" are the issues underlying *Atwater,* or *Apodaca*, or *Herbin,* no pretext is claimed by any party to this appeal. Indeed, as Brown has pointed out, lack of a driver's license should have been articulately suspected before pulling him over for a routine traffic stop, and that didn't happen.

Brown was not allowed to rebut the Court-ordered Response to Petition for Panel Rehearing. This is also a gross Tenth Circuit error.

Willie Brown was not arrested for an infraction. Not at all. All y'all are off point.

8. Is there no qualified immunity?

There is a presumption that government always acts within the law and is always right. The two officers defending in this appeal claim qualified immunity. That is a presumption only, and that is pierced by four proofs: absolute liability, probable cause, discretion within job scope, and that the law was not clearly established at the time of Brown's arrest.

A. Qualified immunity is a derivative of the absolute immunity doctrine introduced in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). The Supreme Court decided that the absolute immunity Secret Service supervisor Fitzgerald was claiming only belonged to the President and his Cabinet, but more importantly, the one claiming it has to prove it. Qualified immunity is not just a passive defense. Here the deputy and the trooper have not met their burdens of proof, and Brown has overcome their argument.

B. The officer's opposing counsel has put the cart before the horse and thoroughly confounded the Tenth Circuit judges. Counsel makes the preposterous assertion that because Brown's arrest was justified by probable cause, they have qualified

immunity. We've seen nothing that shows a probable cause existed for either a headlight out or a valid driver's license. Again Brown has overcome their argument.

Thirdly, the officers argue they had discretion within their job scope. There is no statutory discretion to arrest for a headlight out and no statutory discretion to arrest for a valid driver's license. Both of these "crimes" exist only as creatures of statute. The officers' job scope incorporates these traffic statutes, which don't authorize arrests outside statutory creations in Kansas (K.S.A. 21-3102).

Lastly, the law was clearly established at the time of Brown's arrest, as has been discussed previously in point 5 above.

Conclusion: Willie Brown has overcome any and all assertions of qualified immunity by the defending parties, and they are not entitled to claims of qualified immunity.

WHEREFORE defendants lose on facts (evidence), procedure, and law.

Respectfully submitted,
Dated this 25th day of February 2008.

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Certificate of Service

The undersigned hereby certifies three true and correct copies of the foregoing plaintiff's Petition for Writ of Certiorari to the U.S. Supreme Court was delivered by mail, delivered through the U.S. Postal Service, first class postage prepaid, deposited this day, addressed to the office of joint counsels J. Steven Pigg and Teresa L. Watson, at Fisher, Patterson, Sayler & Smith, LLP, 3559 SW 5th Street, P.O. Box 949, Topeka, KS 66601-0949, attorneys for appellees Scott Fisher and County of Miami, and three copies to the office of Brian D. Sheern, in the office of the Kansas Attorney General, Memorial Hall, 2nd Floor, 120 SW 10th Avenue, Topeka, KS, attorney for appellee J. J. Weber.

Dated this ___day of March 2008.